

**IN THE HIGH COURT OF FIJI AT LABASA**

**COMPANIES JURISDICTION**

**WINDING UP ACTION No. 01 of 2015**

**IN THE MATTER of JOGI BRIJLAL AND SONS LIMITED, a body corporate**  
has its registered office at Nasea, Labasa.

**AND**

**IN THE MATTER of the COMPANIES ACT**

**AND**

**IN THE MATTER of application for winding up order pursuant to**  
sections 212 and 220 of the Companies Act

**BETWEEN**

**SUBHAS RAI CHAND of Nasea, Labasa, Taxi Driver and**  
Minority Shareholder.

**PETITIONER**

**AND**

VIJAY KUMAR of Nasea, Labasa, Businessman and Company Director.

**RESPONDENT**

**Counsel** : Mr. Kohli A. for Petitioner.  
Mr. Lomaloma P.R. for Respondent.

**Written Submissions** : 26<sup>th</sup> September, 2016.

**Date of Ruling** : 06<sup>th</sup> October, 2016.

**RULING**

[1] The petitioner by summons dated 29<sup>th</sup> April, 2016 sought the following orders from the court;

- a) To execute transfer of Crown Lease No. 14199 being Lot 1 SO 3933 together with all necessary documents associated with transfer on behalf of the company to effect transfer of the Crown Lease to the highest tenderer.
- b) To uplift Crown Lease No. 14199 from Bank of Baroda and to undertake to settle any debt owned by the company to the said upon the settlement of the sale.
- c) To lodge all company returns for Jogi Brijlal and Sons Limited to Fiji Revenue and Customs Authority in the event the same has not been lodged.

- d) To make arrangements for the payment for the taxes, if any, to Fiji Revenue and Customs Authority on behalf of the company upon receipt of the settlement sum.
- e) To obtain assessment of Capital Gains Tax (CGT) on sale of Crown Lease No. 14199 and to give undertaking to pay any CGT applicable upon settlement.
- f) To attend to settlement of sale of Crown Lease No. 14199.
- g) To attend to payment to all shareholders of the company their respective shares from the proceeds of the sale.
- h) To do all things necessary to enforce the orders of this Honourable Court.
- i) To obtain all necessary information from Fiji Revenue and Custom Authority pertaining to the company record of past dealings of the company.
- j) To do all things to wind up the affairs of Jogi Brijlal and Sons Limited.
- k) That the costs be paid by the company on indemnity basis.

[2] On 18<sup>th</sup> January, 2016 the court made order to wind up the company question and the respondent filed summons seeking to stay the execution of the order of winding up on 29<sup>th</sup> February, 2016. On 07<sup>th</sup> March, 2016 both parties tendered to the Court what was called "Terms of Stay", according to which the parties of consent agreed to stay the execution of the winding up order on the following grounds and the court made order accordingly.

1. **That** the Petitioners solicitors advertise for sale of the company property being Crown Lease No. 1499 Being Lot 1 SO 3933 through private tender, upon the advertisement being approved by solicitors for the respondent.
2. **That** the tenders be received by the Petitioners Solicitors office and a proper record be kept of the tenders.
3. **That** the tenders be opened on 30<sup>th</sup> March 2016 at 4pm.
4. **That** the tenders be opened in the presence of the solicitors of both the Petitioner and respondent together.

5. **That** the highest tender above the valuation shall be accepted by the parties.
6. **The** Petitioner shall be entitled for one quarter of sale price after deduction of any Capital Gains Tax.
7. **That** upon payment of one quarter of the sale proceeds, the Petitioner shall have no claim against the company and shall forthwith transfer his shares in the company to the respondent.
8. **Any** debt of the company be paid from the shares of the respondent.
9. **Upon** receipt of the highest tender, the respondent shall forthwith execute transfer of the said Crown Lease to the incoming purchaser and shall do all things necessary to facilitate transfer and payment of the Petitioners share.
10. **That** Maqbool & Company shall be entitled to act as solicitors for the vendor in all conveyancing transaction.
11. **Each** party shall bear their own costs.

[3] It is not a fact disputed by the respondent that the tenders were called for the sale of the company property and the highest tender was accepted and tenderer has already deposited \$100,000.00 as an advance payment.

[4] The learned counsel for the respondent submitted that the stay order only becomes effective after the conditions set out in the order are met. Since these conditions have not been fulfilled, the winding up order is effective and has not been stayed. The remedy for non-performance of the conditions is therefore to enforce the winding up order and not to enforce the conditions of stay which is incorrect. The parties entered into the above settlement and stayed the execution of the winding up order on the undertaking given by the respondent to comply with the terms of settlement. When the respondent refuses to honour his part of the settlement the petitioner has the right to come before court and obtain an order of enforcement.

[5] The learned counsel for the respondent also submitted that the terms of stay are akin to a settlement or arrangement with creditors and contributories in a

winding-up by the court as contemplated by part XIX and Order 67 of the Companies (Winding Up) Rules which provides as follows;

In a winding-up by the court, if application is made to the court to sanction any compromise or arrangement, the court may, before giving its sanction thereto, hear a report by the official receiver as to the terms of scheme, and as to the conduct of the directors and as to any other matters which, in the opinion of the official receiver, ought to be brought to the attention of the court.

[6] The learned counsel has not indicated from which Winding-Up Rules he obtained these provisions. The Companies (Winding Up) Rules 2015 made under the Companies Act 2015 (Act No. 3 of 2015) does not contain such a provision. However, these are not mandatory requirements. It only gives a discretion to the court to hear a report from the official receiver before giving its consent.

[7] The learned counsel for the respondent also submitted that since the order for winding up has already been granted the court has become *functus officio* and it cannot make any variation to the order. The learned counsel cited the decision in **Re V.G.M. Holdings Limited [1941] 3 All ER 417**. In the said case it was held that where a judge had made an order for a stay of execution which had been passed and entered, he is *functus officio* and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

[8] The petitioner has not sought to vary the winding up order. It is with the consent of the respondent that the court made an order with regard to the application for stay of execution of the winding up order. It is in fact not an order of the court given after considering the merits of the application. The order on the application for stay is based purely on the undertaking given by the parties. The court as a practice converts the terms of settlement to an order of the court for the sole purpose of making it binding on the parties. Once an undertaking is given to the court the parties must honour it. If the consent of the respondent was obtained by force or

misrepresentation he must make a proper application to have such a settlement vacated. The respondent waited all this time till the petitioner complied with his part of the settlement and to make this application to compel him to honour his part of the settlement. The respondent should have known or been properly advised by his solicitors on the effect of the settlement before agreeing to its terms.

[9] The following observation made in the case of **E.T. v Attorney General & Another** [2012] eKLR 4 was cited with approval in **Deo Kumar** [2014] FJHC 648; HBC122.2013 (8 September 2014);

A compromise agreement is a contract whereby the parties make reciprocal concessions in order to resolve their differences and thus avoid litigation or to put an end to one already commenced. When it complies with the requisites and principles of contract, it becomes a valid agreement, which has the force of law between the parties.

When a compromise agreement is given judicial approval, it becomes more than a contract binding upon the parties. Having been sanctioned by the court, it is a determination of the controversy and has force and effect of a judgment and is covered by the doctrine of *res judicata*.

[10] Justice Pathik cited the following observations made by Templeman J. in **Tigner - Roche & Co. Ltd v Spiro and Another**, the Solicitors Journal Vol 126 (6.8.82) in **Vivras Development Ltd v Fiji National Provident Fund Board** [2002] FJHC 248; HBC0277r.2001s (20 June 2002);

In the present case there was a contract, the terms of which were precise. It was plain that the order and the terms of the schedule embodied in the negotiations between the parties and were the part of the terms of the contract. The defendants had failed substantially to comply with the undertakings they had given, and the judge had no power to alter the contract and deprive the plaintiff of the relief which they had bargained to obtain and had obtained their contract..... The


defendants had not complied with the undertakings and they must accept the consequences.

[11] In **Purcell v F.C. Trigell Ltd (trading as Southern Window and General Cleaning Co) and Another** [1970] 3 All ER 671 CA it was held that for a consent order, whether interlocutory or final, must be given full contractual effect and could only be set aside (Lord Denning MR deferring) on the grounds which would justify setting aside a contract.

[12] In the circumstances the court is of the view that the petitioner is entitled to the orders sought in the summons dated 29<sup>th</sup> April, 2016.

### ORDER

1. The orders sought by the petitioner in the summons dated 29<sup>th</sup> April, 2016 which are referred to in paragraph [1] above are granted.

  
Lyone Seneviratne

JUDGE



06<sup>th</sup> October, 2016